



ASPECTS OF LAW REVISION IN SMALLER JURISDICTIONS



By Neil Adsett

A paper for the ALRA conference in September
2008 in Vanuatu

Arrangement

1. Introduction
2. The law revision problem in some places
3. What sort of “law revision”?
4. A methodology
5. Format of revised edition
6. General
7. Conclusion

1. Introduction

This paper will focus mainly on smaller, less sophisticated Commonwealth jurisdictions and the ways in which they may keep their body of statute laws organized and under review.

2. The law revision problem in some places

2.1. I see everywhere that in many smaller jurisdictions the statute book is becoming obscure – many of the laws are out of date, very hard to find, out of print, often un-indexed and overlain with new and conflicting provisions.

In many such countries they are fortunate if they have one experienced drafter in the chambers, and the Attorney General has to try to provide the government with their ever increasing quota of new and urgent legislation, as well as run the country's legal services and appear in the legislature and even the courts. The formal Law Reform process may be given a low priority, so the alternate law reform possibilities covered in this paper may be of some interest.

When nothing is done about the difficulties with legislation, the problem compounds with time so that the rule of law could break down –

- lawyers and judges just guess at what the law may be,
- citizens cannot work out what law applies and are left in the dark or reliant on lawyers if they can afford them,
- legislatures find it easier and safer to enact new laws hoping to smother the problem but often creating confusion around the edges and problems with consistency and compatibility.

An answer to this problem is to conduct a complete law revision exercise and publish a new revised edition of the laws of the country.

2.2. This is an old practice within the Commonwealth and everywhere that I go I find old sets of revised editions on the shelves that resulted from successive law revision exercises – formerly regularly organized by the colonial authorities in London for Britain's distant colonies, and continued by them after independence.

Many smaller Commonwealth countries need to resume this process but few now get around to it because of lack of people to do it and money to pay for it. Larger jurisdictions have also had difficulty undertaking entire law revision exercises, in part because of the huge increase in the size of their statute book.

In the Pacific we have the valuable PACLII website collections of the legislation of most countries, and then if users know exactly what law they want to refer to, in many cases that law will be there on the PACLII site, along with a great collection of recent cases. However in very few countries in the Pacific can you find a recent Index of the statute law – you may find an Act

but have no way of knowing if or when it came into force, whether and how it has been amended or repealed or how it fits within the entire body of law.

In the Caribbean – a legal community with about 10 jurisdictions having legal infrastructure very similar to that of Pacific countries, they don't yet have a general website database, but in the Caribbean they do have legislation indexes for a dozen countries still being maintained by the University of the West Indies.

To assist in efforts to organize law revisions or at least to do something about the problem, I propose now to mention some issues that will arise in the law revision process.

3. What sort of “law revision”?

3.1. Authority for law revision

This work was typically done under statutory authority and the practice is, early in the project to foster and enact a law that authorises the law revision, defines the powers of the Law Revision Commissioner and the status of the resulting revised edition. The original schemes were virtually the same in all Commonwealth countries - and the modern empowering Acts enable the same whilst also catering now for regular updating, computer versions and the internet.

One innovation we have tried recently in Tonga, is to combine in one Law Commission the law revision and publication functions along with a statutory system of formal law reform. In smaller places, other legal functions could be included in the one commission – law reporting and anti-corruption for example.

3.2. Consolidation

The law revision I am talking about is a re-organisation of the statute book – you find all the existing law, incorporate the amendments and publish a new revised edition as the official law.

The empowering law allows you to produce one consolidated law out of the original and its direct and indirect amendments.

A consolidation is really the starting point, but if that cannot be organized at least the existing original laws should be made available.

3.2.1. Existing laws

There should be annual volumes of enacted laws (Acts and subsidiary) in paper form as published in the Gazette, as well as the PACLII website and others that a country can maintain itself. These make the law accessible in a sense but they do not actually set out what the law now is – you still need to hunt around and find all the amendments and wade through the morass of no longer relevant provisions that are a trap for the inexperienced. A comprehensive index with the full database of laws will largely answer the problem if that is

the best that can be provided – the users can themselves each time compile their own consolidation of that part of the law that interests them.

3.2.2. Ancillary material

In any event a consolidation will just reveal the applicable statute law and you still need to know how the courts have interpreted that legislation, what common law the courts have decided applies alongside the statute law, and also how the law is administered in practice. A law revision will throw some light on the applicable statute law – the next interesting developments will be to integrate cases and practice notes alongside legislation.

3.3. Statutory powers

The consolidation is the *sine qua non* and beyond this there are the usual statutory powers to rectify, correct, tidy up, combine related laws or remnant stand alone provisions, to treat as spent any such provisions that are no longer relevant, modernise the language, substitute current names, offices etc. This is useful but it all stops short of actually changing the meaning of the law. Even creating sense out of existing nonsense can change the meaning sometimes and this cannot be done without parliamentary approval.

You could do a consolidation without corrections and tidying up and still arrive at the existing law, but it may also prove possible to go beyond this to find, raise and fix the law reform problems that emerge from existing legislation.

3.4. Amendments – Law Reform

When carrying out a law revision it is useful to establish a system for identifying areas where changing existing law is desirable or necessary. It may be possible to create a cabinet sub-committee that ideally will include representatives from judges, private lawyers and non-government organisations. The committee meets to consider problems that are found, devise a solution (often a direct amendment), foster this through cabinet and the legislature and if enacted the change can be reflected before the revised edition is published. Often this is by a series of miscellaneous amendment Acts that tweak the laws to make them conform and be workable and correct.

Often if there is a large area of the law that should be reviewed and changed this will be beyond the law revision exercise. If there is a law reform agency in the country the Attorney General can refer the issue to it, or we will try to include the work in the general legislative programme or even recruit external drafting resources to foster new Acts when possible.

3.5. Input from public

It is useful when reviewing the law to seek public input – advertise in the press for the public, or the legal or other professions or the civil servants to report any areas of the law that are unworkable or wrong, or in apparent confusion. Some Attorneys General have not wanted to do this but it seems to me that if there are skeletons in the closet then let them be exhumed and dealt with – indeed the law revision process is a good opportunity for such problems to be

“discovered” afresh and for troublesome political thorns and logjams to be dealt with by the broadly based committee under the banner of housekeeping and lawyers’ *force majeure*.

3.6. Status of the revised edition

The status of the law revision when published is an issue that will emerge.

The traditional approach is to make it authoritative – “without any question, in all courts, the one and only true law of...[the country]” is a usual old legislative formula used in the empowering Act. This then does lead to a fresh start that will not still require the lawyers to dig out the old texts just to confirm what is stated. One Canadian province I recall went even further and repealed all the existing laws and replaced them with the revised edition. I would baulk at this further step and take solace in the certainty that if we made a glaring mistake the courts would surely find that exercise of statutory powers to be *ultra vires* and they would correct it.

There have also been examples of a revised edition (more a mere consolidation really) being given advisory or prima facie status only – in theory this would mean that a careful lawyer may still have to wade through the originals, but I wonder if in smaller jurisdictions this would make much practical difference?

An interesting new combination can now arise if a revised edition is published on the internet. The revised edition of the laws is made official by the authentication Orders of the Attorney General or President and as printed or placed on a web site that is official, – but what if the country has the ability to update that website regularly with amendments shown and new laws included? This can be done daily but usually such changes to the officially authenticated revised edition cannot practically become immediately part of the “official” laws. Unless being operated by a large state, it safely and practically cannot be done more often than annually.

So what is the status of the revised edition as updated daily on the website? One way is to provide that the authorised version is that last officially signed off as such, but that the website version updated daily or weekly has advisory status – and I suspect that as users become secure in the process and the caution of the drafters controlling the website, they will rely on the website regardless of its official status.

3.7. An alternative to the full law revision

This may be considered necessary if the statute book is so large and complex that the full task has become beyond the practically achievable.

Any improvement will surely be better than nothing, so even if all that is done is the research of obsolete statutes and their eventual repeal then that is of some value. Likewise if there are only resources to revise single laws or areas of law then that also is of great value.

Nevertheless, even for the largest jurisdictions I would recommend having the final product of a wholly revised statute book; a fresh start, as the master goal with all the interim partial revisions seen as steps along the path. Thus there

are quick welcome results and even if the whole overall process fails then light has been shone onto previously obscure areas of the law – and if the jigsaw of changes does all fall into place in time then you will have the coherent statute book and fresh start.

3.8. Publication

Usually over 2 or 3 years we work on this intensively and then print the new books in hardcopy and on CD, or preferably now develop a website, and publish the revised edition as the new authoritative version of the law of the country.

4. A methodology

I would like in this Part to look more at the details of the law revision process, and to mention options and alternative approaches.

The following procedures are examples of ways that law revisions have been completed with some success – but this will differ in each place so you may adopt any of these ideas and take aboard what you want.

In the legal sphere, Commonwealth countries have many similarities and when preparing legislation for revision, I see many of the same Acts and procedures that were inherited and borrowed; or more recently promoted by international agencies, for example the recent money laundering and anti-terrorism laws. A regional approach to dealing with these common matters is tempting, but every law revision or drafting undertaking must be tailored uniquely for the particular circumstances in each country.

The Detail

4.1. Firstly find all the law. Usually I go back to the last revised edition as the starting point. If anything was omitted from that then I leave it alone and list the old and new omissions. Find and read every new law – Acts as well as subsidiary legislation; and also skim through the government gazette at the general notices in case something of legislative effect has been published in the wrong place. I always look for the official copies signed by the Governor in case there is a difference in versions. Be especially careful of computer files apparently of the final law – unless there was a foolproof system in place at the time there is always the chance that an earlier version is the one saved on computer or of some late change in the parliament that resulted in a change by the government printer without reference to the drafters and their computer files.

4.2. With all the law in front of you, create a working Index of the current law – put in commencement dates, amendments, comments etc. as you come across them. I try to work forwards – so start with the last Index from the previous revised edition (or go back to the first received or enacted laws if need be) and build it up. This may result in wasted effort in, e.g., noting up the 1970 Traffic Act and all its amendments until 1990 when it was repealed and replaced with another, but if you keep saved an annual version of the Index

then it sometimes helps to go back and see what became of a provision and what law applied from time to time.

Sample of working Index	
	<p>AERODROMES (ADMINISTRATION) LAW 1952 L.17/1952 in force 21.6.52 Amended by L.19/1967 <i>[inserts Articles 4A-4B]</i> Amended by L.10/1982 in force 9.7.82 <i>[amends Articles 4A-4B]</i> Amended by L.5/1991 in force 10.5.91 <i>[General change "Airport Commandant" to "Airport Director"]</i> Amended by L.21/2001 in force 17.08.01 <i>[substitutes Articles 4(2), 4A(1) and 4B]</i> Aerodromes Regulations 1965 R&O.4629 Amended by R&Os 5023, 6880, 7542, 60/2001</p> <p>AFFIDAVITS (ADVOCATES AND SOLICITORS) LAW 1992 L.8/1992 in force 14.8.92</p> <p>AIRPORTS ACT 1986 ORDER 2000 <i>(Applies Airports Act 1986 (UK))</i> OinC.13/2000 in force 19.4.00</p> <p>Airports <i>see</i> Aerodromes and Civil Aviation</p> <p>Air transport <i>see</i> Carriage by Air</p> <p>AIR TRANSPORT PERMITS LAW 1998 L.7/1998 in force 1.1.99 Amended by L.30/2002 in force 02.07.02 (Article 5(2)) and 09.08.02 (remainder) <i>[amends Articles 1, 2, 6, 8; inserts Article 16A, Schedule]</i></p>

4.3. Also at the same time I will be preparing a disposition Table to show the history of the Acts so that you can go back and see e.g. that the 1970 Act and its amendments were repealed by what, when.

Sample of disposition table		
Law 30 of 1997	Companies (Amendment No. 3) Law 1997	Incorporated in Chapter 13.125
Order in Council 31 of 1997	The Broadcasting Act 1996 (British Broadcasting Corporation Transmission Network) Order 1997	Chapter 06.090
Order in Council 32 of 1997	The Food and Environment Protection Act 1985 (Amendment) Order 1997	Chapter 20.150
Order in Council 33 of 1997	The Merchant Shipping (Salvage Convention) Order 1997	Repealed by S.I. 1284 of 2004
Law 34 of 1997	Explosives (Amendment No.2) Law 1997	Spent, omitted
Law 35 of 1997	Health Insurance (Amendment No.12) Law 1997	Incorporated in Chapter 26.500
Law 36 of 1997	Nursing and Residential Homes (No.2) Law 1997	Omitted
Law 40 of 1997	Prison (Amendment No. 4) Law 1997	Not in force at revision date
Order in Council 42 of 1997	The Transfer of Prisoners (Restricted Transfers) Order 1997	Not included in revised edition

4.4. This involves skim reading the laws looking for amendments to other Acts etc. that should be noted in the Index and that may be buried in the body and not just in the separate (“Repeals, amendments”) sections.

4.5. You must work on computer. Ideally yourself directly and not just through marked up hardcopy delivered to a secretary – perhaps that would work but would be slow and the necessary computer searches would be lost (e.g. searching the database for certain words or provisions).

For drafters used to writing directly into their computer it is hard to imagine the old days when you had to write everything out in biro and have it typed for you when somebody got around to it. In most of the small drafting offices I have visited in the Commonwealth (about 15 different countries) most of the drafters did not themselves use computers for drafting. That situation is probably changing fast but since it is often the senior (even semi-retired) drafters doing this law revision work, then I suggest that if you plan to undertake a law revision and are one of those not using a computer, you spend the first weeks of the law revision project taking courses in Microsoft WORD or other word processing software, and becoming familiar with working in it. Everyone had to learn it once and many of us are 2 finger typists rattling along merrily. I try to avoid long typing exercises and will have this done by a typist or scanned in and proofread.

4.6. So when I have compiled an Index that I am happy with, I know a fair bit about all the laws we need to deal with. I would then convene a meeting of the government committee and propose what we should include, and how and what we could omit (try to avoid processing hundreds of pages of, e.g. customs regulations etc. which you know will be replaced regularly or will be repealed soon, or laws that are private in nature, spent, impliedly repealed or completely useless). If there are only resources to do the principal legislation, or some of it, then deal with that and devise a law revision project that will work and conclude in a reasonable time.

Mostly I will work intensively with the laws of a certain jurisdiction for 2 or 3 years and then finish, publish and move on. Many of the law revision projects I came to had a failed project in the fairly recent past – usually expensive, long and productive of nothing – so beware of starting something that is beyond what is practically achievable. I also presume that nobody else will cooperate at all – even by replying to queries, and I suggest that you just finalise the laws on that basis so that the work does conclude – rather than bog down waiting on replies and instructions. If the departments etc do reply then that is a bonus and if not then the law as it stands is what must go into the revised edition.

4.7. In a big jurisdiction, once you have taken stock of what is on the statute book, you can then decide what you want to achieve and how to attack it. At this stage it would be useful to send up to the cabinet or relevant sub-committee the options – with resource, time and cost implications.

4.8. Now you need to capture this large number of relevant pages in computer form. I outsource to a large data capture firm to have it all typed (double compared entry) into word processing files I can use. I use Microsoft WORD and it does everything I want – with a few macros tacked on here and there by

a specialist computer expert. I know that in larger sophisticated jurisdictions the IT people will have you through the hoops with very complicated systems that lock you in to reliance on the IT experts and particular systems – that is fine but I am dealing with getting a practical sustainable result in places where there are just a few people ever likely to be involved and where the staff changes regularly.

4.9. In compiling the Index I will name every piece of law (e.g. Law 18/1998 (or 1998-18 for the computer)) consistently and mark this on the set of hardcopy laws itself, along with marks on the pages that I want photocopied and sent to the data capture firm. So you will get back from data capture hundreds of files named consistently (e.g. a 1999 folder with Laws 1 to 35 and SROs 1-60).

Often it is most convenient to group laws into subject groupings, e.g. Criminal Law and Financial Services, and to arrange them so into chapters. The advantages are –

You then work on one group of related laws at a time and so ensure that they are consistent and cover the whole field;

Users coming to the revised edition looking for the law on a certain subject can find it all in one place, and if the names of laws are unfamiliar in an alphabetical arrangement (e.g. Acts Interpretation Act or Interpretation Act?) they can be found in the relevant subject grouping,

If the revised edition is published in book form, then one or two volumes may include all the laws that e.g. police prosecutors need to have or take to court.

An alphabetical list of laws should also be compiled and will enable users to find the law they want if they do know the exact name – this is easy to do with computers' sort facility and should be done at the very end to avoid duplicating late changes and corrections.

4.10. When the data has been captured in computer form, it will be in tidy form if you specify styles and protocols with the computer operators and work on early samples. Whether to have them e.g. enter Tables of Contents from fields embedded in the text and other wizardry is up to the level of sophistication required – you have to be aware that when you hand over the revised edition, someone in that country has to keep it up to date and work with it – in many of the smaller jurisdictions there is nobody. Leaving simple computer files consistently styled that will print just like in the book is useful.

4.11. So you have these files and now commences the great fun task of doing a cut and paste on screen to do a consolidation. Years ago the consolidation was done by physically cutting with scissors and pasting with glue and then sending manuscript to printers, but now computers and desk top publishing have made that process redundant.

4.12. I find it useful to start with a handful of the most important Acts as a dry run – this way you can tease out the decisions on methodology and formatting early and also produce an interim result that will be of great use (and help secure support and funding for the rest of the project).

4.13. At this stage you actually have to get your head into each law and its related laws. I try to only do this once in a project as it takes time to suspend perhaps a dozen different provisions in your head to work out what the resultant current law may be.

4.14. I enjoy doing this on screen consolidation but if there is a lot to do and I have reliable legal assistants, then other lawyers can actually make most of the consolidations. This all needs checking and proofreading and at each version of the computer file I save a copy – e.g. “Firearms Act 1988 version 3B”, and usually end with perhaps 20 versions of a law for the revised edition. That way you can always go back a level or two if there is a temporary problem, and you know the law went through the procedure of checking, proofreading, revisiting etc. arrived at – this is necessarily different for every job and dependent on the empowering law, resources available etc. but in each case devised to ensure correctness.

4.15. At this stage you need to have sorted out such issues as –

The degree of footnoting – (what to do, endnotes?); the use of cross referencing and noting (be careful that you leave in place a system to ensure that these are also always updated – it is better to keep it very simple than run the risk of the note later being wrong).

Renumbering sections? – traditionally in a revised edition the laws have been renumbered so that the numbering is consecutive with no gaps where sections have been repealed and no sections e.g. “15AB” where several new sections have been inserted. To do this you need to be sure that all cross references are similarly changed and this requires detailed proofreading and checking. Computer searches and macros will help with this, but if you are not sure that you can get it exactly right every time then I suggest that you do not renumber;

Rendering the language gender neutral?

Changing proscribed words (e.g. “lunatic”), spellings, drafting formulae (e.g. penalties and adopting penalty point system), capitalisation, italics for latin etc.

4.16. Also at the close reading and consolidation stage you need to be in constant touch with the government agency giving instructions on e.g. implied amendments, actual meaning and reason for provisions, problematic commencements etc. (hopefully one senior person in the legal department can be found who will reply promptly).

I prepare regular papers raising issues for policy decision by the government committee supervising and advising my work as Law Revision Commissioner (e.g. if parts of 2 Acts are inconsistent; mistake found etc). This gives direction in the preparation of the revised edition and will lead to the drafting of amendments to the law. I often prepare Miscellaneous Amendment Bills to accompany the law revision committee paper and as approved it goes up to Cabinet and the Legislature and if enacted we can show the changes in the final revised edition version of the relevant law.

5. Format of the Revised Edition

5.1. If you are doing a partial law revision or just revising certain laws, then they would be published (in accordance with any empowering legislation) in the same manner as any new law being brought into force.

5.2. A complete new revised edition always used to be published in book form in however many volumes were necessary. This format is good as a permanent record and even now it is usual to have a number of sets bound as books for formal and archiving purposes. The drawback is that books cannot be updated and so the loose-leaf editions became more common.

5.3. These loose-leaf publications can be updated regularly by the removal of superseded pages and the insertion of replacement pages showing the law as now amended and also including new laws subsequently brought into force. The problem with this format is that unless users are diligent, loose pages will become lost and new pages not inserted correctly or at all; so we found that loose leaf publications were often losing their value in a short time.

5.4. A variant of these is the publication of loose-leaf pamphlet versions – whereby you would discard the entire affected law and replace it with the current revised edition pamphlet – thus there is less risk of loose pages being lost or misplaced but there is more wastage as many unaffected individual pages have to be replaced. This is now my preferred format for paper versions of revised editions.

5.5. Now in some jurisdictions the revised edition is also published in electronic format on a CD – this is useful as the CD can be replaced entirely for little cost and the user can search and carry the laws efficiently. Often the government will want to make some money out of the sale of the revised edition and so will sell the books. The CDs can also be sold but there is the problem that they can be copied easily and hence revenue is lost.

5.6. Publication of the revised edition on the internet is the ultimate – any amended or new laws can very quickly be included at very low production cost, electronic searches are enabled, there can be a point in time facility built into the database whereby users can find the law as it applied at certain different dates, and the government can still make money by charging for access to or usage of the website.

5.7. These format options can be decided and changed at any time really – the laws are prepared in computer form and whether they are then printed or worked into an internet site is just a technical consideration depending on what the government decided from time to time. At the start you need to ensure that the files are based on consistent styles and then the WORD or other word processing files can later be converted easily into any required format by the IT people – be it html, xml, pdf, frame or any other format decided upon.

5.8. The IT experts will in my experience try to run the show and have you working within a straight jacket both as a drafter and as a law revisioner – I think that the lawyers should remain firmly in control and work in the way that will suit their professional considerations first. When the drafters have

finished, they can let the IT people hone that professional product to what they then need to deliver their output. Do not be bamboozled by the IT jargon – in this field the drafters are the experts and the IT people, wizards that they no doubt are, should be able to take what we give them and turn it into what they need, provided that we can agree on the initial formatting.

6. General

6.1. So basically that is how I would go about organizing a law revision project in a small jurisdiction. Often you will need to deal also with every practical issue leading to getting new books on everyone's shelves such as printing, binding, buying the paper, advertising, and also the organizing of experts to establish a web site, deciding what price the government will charge for the books or access to the web site or CDs.

6.2. There are various Indexes and lists that are prepared and published with the revised edition –

- Table of contents,
- Chapter list,
- Title list,
- Volume contents,
- Index,
- Historical Index,
- List of omitted laws,
- Disposition Table,
- General notes.

6.3. Finalising these for print is a good time to cross check everything yourself – as you progress through the entire statute book and get into the law as a whole, your views may change so that something treated early in the job may need to be redone.

6.4. The matters raised in the law revision committee papers are crucial. There may e.g. be whole rafts of very out of date legislation that can be included in the revised edition, but it would be useful if the problem could be raised and decided in cabinet and new laws drafted. A dedicated law reform agency could take over this task, or if that is not possible then another strategy could be adopted – by inclusion in the legislative programme, by consultant drafters, or even placement on the long term government wish list is better than nothing.

It is good to raise these issues because nobody but the drafters and law reformers may even be aware of the problem at that level – e.g. the post office workers may bemoan the archaic postal system, and the public also complain about the service, without realising that a revision of the old postal laws (usually so) could solve the problems. This housekeeping may also be of great use to drafters in their daily work – e.g. not having to process long old regulations etc. where that administration could better be dealt with by internal guidelines, or where a simple change to the Interpretation Act can avoid repeating provisions in every single Act.

7. Conclusion

I hope that this paper will be of interest to some of you at some stage.

If nothing else, I hope that I have indicated, to drafters and others faced with a shambles of statutes all over the place, that they can be organized and you can get a fresh start within a reasonable time frame and with limited resources.